

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

FREDDY ARIAS,

Plaintiff,

v.

JOHN MCHUGH, SECRETARY OF THE
ARMY,

Defendant.

NO. CIV. 2:09-690 WBS GGH

MEMORANDUM AND ORDER RE:
MOTION FOR SUMMARY JUDGMENT

-----oo0oo-----

Plaintiff Freddy Arias brought this action against John McHugh in his official capacity as Secretary of the Army¹ for damages and cost recovery pursuant to the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-83, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006). Defendant John McHugh, Secretary of the Army, now moves

¹ Plaintiff's First Amended Complaint ("FAC") complains against Pete Geren, who was Secretary of the Army when plaintiff originally filed his complaint. On September 21, 2009, John McHugh was confirmed as Secretary of the Army. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, John McHugh is substituted for Pete Geren as the defendant in this suit.

1 for summary judgment on plaintiff's First Amended Complaint
2 ("FAC") pursuant to Federal Rule of Procedure 56 on the basis
3 that there is no genuine issue as to any material fact and that
4 the defendant is entitled to judgment as a matter of law.

5 I. Factual and Procedural Background

6 Plaintiff is was at all relevant times a lawfully
7 admitted permanent U.S. resident, and was hired by the U.S.
8 Department of the Army on October 7, 2002, through the Student
9 Temporary Employment Program ("STEP")² as an office clerk at Pine
10 Flat Lake. (See Pl.'s Response to Def.'s Statement of Undisputed
11 Facts (Docket Nos. 67-68) ¶¶ 11, 14; Amended Taylor Decl. (Docket
12 No. 65) Ex. 1.) In January of 2003, plaintiff changed positions
13 to become a student park ranger at Pine Flat Lake (Pl.'s Response
14 to Def.'s Statement of Undisputed Facts ¶ 15; Amended Taylor
15 Decl. Ex. 2.) Plaintiff eventually worked through the Student
16 Career Experience Program ("SCEP"). (Amended Taylor Decl. Ex.
17 7.)³ Students in either STEP or SCEP programs can be non-
18 citizens, provided they are a lawfully admitted permanent
19 resident or otherwise authorized to be employed. 5 C.F.R. §

20
21 ² The STEP program for students provides for temporary
22 hires in the excepted service of one year or less and does not
23 confer eligibility to be promoted or noncompetitively converted
24 to term, career-conditional, or career positions. (Pl.'s Ex. in
25 Supp. of Opp'n to MSJ Ex. 1-2.); see 5 C.F.R. § 213.3202(a)(10).
26 Students may be noncompetitively converted to the SCEP program
27 whenever they meet that program's requirements and a suitable
28 position is available. 5 C.F.R. § 213.3202(a)(15).

29 ³ Students in the SCEP program who have met all of its
30 requirements may be noncompetitively converted to a career or
31 career conditional appointment at any time within 120 days of
32 satisfactory completion of their degree program. Id. §
33 213.3202(b)(10). Students in the SCEP program, however, must
34 obtain U.S. citizenship before they can be converted. Id. §
35 213.3202(b)(6)(ii), (b)(11)(i).

1 213.3202(a)(6), (b)(6). SCEP students must obtain U.S.
2 citizenship, however, before they are eligible to be
3 noncompetitively converted to a term, career, or career
4 conditional appointment. Id. § 213.3202(b)(6)(ii).

5 In 2006 Ken Manning, the security officer for the
6 Sacramento District of the Army Corps of Engineers, discovered
7 three non-citizen contractors in the Sacramento District with
8 access to Department of Defense occupied buildings and computer
9 systems in violation of their contracts. (Amended Taylor Decl.
10 Ex. 53 (Manning Depo.) 16-17.) In response, Manning set out to
11 determine if there were any other non-U.S. citizens working in
12 the Sacramento District who were not complying with security
13 protocol. (Id. at 15-17.) Manning sent an e-mail request to
14 front-line supervisors in the District requesting them to
15 identify anyone who was not a United States citizen working in
16 their area. (Id. at 16.) Manning received e-mails in response
17 that revealed four additional non-citizens, all of whom were
18 employed under student-excepted appointments and were not
19 complying with governing security regulations for non-citizens.
20 (Id. at 17.)

21 Two of these employees, plaintiff and Hector Galvan,
22 worked in the student program at Pine Flat Lake. Both plaintiff
23 and Galvan were Mexican citizens. Manning believed that the
24 Department of Army regulations required all non-citizen employees
25 to be identified as such in all Department of Defense
26 communications, and that such employees would have to have their
27 access cards modified to display a red stripe. (Id. at 18, 31-
28 32.) Manning advised managers on August 22, 2006, that security

1 regulations must be enforced; specifically, that any non-U.S.
2 citizen employees must change their Outlook e-mail identifier and
3 access card to reflect their non-citizenship status. (See
4 Amended Taylor Decl. Ex. 36 (Pl's Resp. to Req. for Admissions
5 Set One) ¶¶ 51, 58.) Access cards of non-citizens were to be
6 changed to have a red stripe when before they had a white stripe,
7 and the Outlook identifier was changed to include "Non-US
8 Citizen". (Pl.'s Index of Exhibits Ex. 9.) On August 24, 2006,
9 plaintiff's supervisor, Michael LaFrentz, forwarded Manning's e-
10 mail to plaintiff and Galvan and instructed them to comply.
11 (Amended Taylor Decl. Ex. 8-10.) Non-citizen employees in the
12 Sacramento District also had their citation-issuing authority
13 revoked. (See Amended Taylor Decl. Ex. 54 (Friedman Depo.) 17-
14 19; id. Ex. 48 (LaFrentz Depo.) 27-28.) On September 25, 2006,
15 plaintiff's citation authority was revoked and he had to
16 relinquish his badge and citation book. (Amended Taylor Decl.
17 Ex. 36 (Pl's Resp. to Req. for Admissions Set One) ¶ 65.)

18 On September 27, 2006, plaintiff made contact with the
19 Equal Employment Opportunity Commission and filed his first
20 discrimination complaint on November 2, 2006. (See Amended
21 Taylor Decl. Ex. 14.). Plaintiff alleged race, national origin,
22 and disability discrimination and retaliation for the (1) change
23 in his Outlook identifier; (2) change in his access card; (3)
24 revocation of his citation authority; (4) transfer from the SCEP
25 program down to the STEP program on September 25, 2006; (5)
26 stress caused by the situation and subsequent need to request
27 several days sick leave(6); discriminatory jokes he experienced
28 at work related to his ethnic background; (7) assignment to work

1 Christmas due to discrimination or possible retaliation for
2 filing his EEOC complaint; (8) denial of a training opportunity
3 in December 2006; and (9) charging him as AWOL on October 6,
4 2006. (Amended Taylor Decl. Ex. 14, 21.) Claims 1, 2, and 3
5 were accepted by the Army's EEO office for investigation, and
6 claims 4-9 were dismissed because they had not previously been
7 brought to the attention of an EEO counselor as required by the
8 regulations. (Amended Taylor Decl. Ex. 21.)

9 Plaintiff's EEO claim was denied on June 26, 2008.
10 (Amended Taylor Decl. Ex. 33.) The EEOC opinion stated that it
11 was denying plaintiff's claims because classification on
12 citizenship is not actionable, none of the alleged actions were
13 "ultimate employment decisions" subject to Title VII protection,
14 decisions were not based on his race or national origin, no
15 retaliation occurred since the issues raised in the complaint
16 occurred prior to his EEO protected activity, and plaintiff's
17 disability claim arose after the events that gave rise to the
18 action. (Id. Ex. 33.)

19 On October 9, 2006, plaintiff was scheduled to work at
20 the Fresno Columbus Day Fair and showed-up for work late and left
21 early, for a total of 1.5 hours, without requesting permission in
22 advance and in violation of attendance policies. (Amended Taylor
23 Decl. Ex. 12-13.) LaFrentz talked to plaintiff on October 12,
24 2006 about complying with his time schedule and his work
25 performance and attitude. (Id. Ex. 13.) Plaintiff submitted a
26 retroactive request for leave for the October 9, 2006 incident,
27 which was denied on October 13, 2006. (Id. Ex. 12.) Plaintiff's
28 reason for seeking leave for the time missed was "due to school

1 ending at 1400" and "to catch-up on school work." (Id.)
2 Plaintiff was therefore charged with being Absent Without Leave
3 ("AWOL"). (Id. Ex. 13.) On October 13, 2006, plaintiff was
4 issued a "Need for Improvement" memorandum which cautioned that
5 the citizenship issue should not interfere with plaintiff
6 fulfilling his job responsibilities. (Id. Ex. 13.)

7 Plaintiff's next annual review by LaFrentz, covering
8 the period from May 1, 2006 through April 31, 2007, was positive,
9 but not as positive as plaintiff's earlier reviews. (See
10 (Amended Taylor Decl. Ex. 29.) Plaintiff took leave on May 6,
11 2007 as a result of stress, and again took leave on July 20, 2007
12 after a meeting with LaFrentz regarding plaintiff's work duties.
13 (See Amended Taylor Decl. Ex. 20.) In July 2007 plaintiff was
14 again counseled about leave policies. (Amended Taylor Decl. Ex.
15 20, 22.)

16 On August 6, 2007, plaintiff called LaFrentz five
17 minutes after he was scheduled to appear for work and told
18 LaFrentz he overslept and would be an hour late to work. (Amended
19 Taylor Decl. Ex. 23, 29.) LaFrentz then called his supervisor,
20 Calvin Foster, to inform him he was inclined to charge plaintiff
21 as AWOL. (Id. Ex. 23-24.) Foster then called his supervisor,
22 Jim Sander, and informed him of his phone call with LaFrentz.
23 (Id. Ex. 24.) When plaintiff showed-up for work, LaFrentz
24 engaged plaintiff in a conversation which became heated. (Id.
25 Ex. 23, 29.) Plaintiff walked out of LaFrentz's office during
26 the conversation and prepared a request for sick leave to present
27 to LaFrentz. (Id. Ex. 23, 29.) LaFrentz called Foster again
28 informing him of the conversation. While LaFrentz was on the

1 phone, plaintiff re-entered LaFrentz's office and presented a
2 leave slip for sick leave for his remaining shift. (Id.)
3 LaFrentz told plaintiff to wait until he was finished with his
4 phone conversation, to which plaintiff responded that he was
5 leaving and that LaFrentz had better "hurry up." (Id. Ex. 23,
6 29.) Foster requested LaFrentz to put plaintiff on the telephone
7 so Foster could speak with plaintiff, which plaintiff refused.
8 (Id. Ex. 23-24, 29.) Plaintiff left LaFrentz's office and called
9 him a "jerk" in front of other employees. (Id. Ex. 23, 29.)
10 Plaintiff then left work without having his leave request
11 approved. LaFrentz conveyed these events fo Foster, who
12 subsequently conveyed them to Sander. (Id. Ex. 24.)

13 Foster and Sander decided to place plaintiff on paid
14 administrative leave pending an investigation into the August 6,
15 2007 incident. (Id. Ex. 24-26.) LaFrentz subsequently signed a
16 removal letter on August 20, 2007 terminating plaintiff, which
17 was effective August 27, 2007. (Amended Taylor Decl. Ex. 27-28.)

18 The letter cited attendance-related offenses and "discourtesy in
19 the workplace" as the reasons for plaintiff's termination. (Id.
20 Ex. 27.)

21 Plaintiff filed his second EEOC complaint of
22 discrimination on October 6, 2007, again pleading discrimination
23 on the basis of race, national origin, and retaliation. (Id. Ex.
24 29.) Plaintiff alleged race and national origin discrimination
25 and retaliation for (a) the August 6, 2006 AWOL charge; (b) the
26 May 17, 2007 level 3 performance rating; (c) being placed on
27 administrative leave on August 6, 2007; (d) receiving a July 20,
28 2007 call from LaFrentz regarding plaintiff's July 21 and 22

1 requests for leave; (e) being asked to sign a leave slip signed
2 by LaFrentz and harassment by him on July 23, 2007; and (f) the
3 August 27, 2007 termination of employment. (Id. Ex. 29, 32.) On
4 October 24, 2007, the EEOC accepted claims a, c, and f and
5 dismissed claims b, d, and e for failure to bring those claims to
6 the EEOC within forty-five days of their occurrence as required
7 by the regulations. (Id. Ex. 32.) Plaintiff's complaint was
8 denied on March 19, 2009, because plaintiff filed the instant
9 lawsuit on September 19, 2008. (Id. Ex. 34]; see 29 C.F.R. §
10 1614.107(a)(3) (dismissing EEO complaints that are the basis of a
11 civil action in federal court involving the complainant, provided
12 180 days have passed since complainant filed the EEO complaint).

13 Plaintiff filed the instant lawsuit on September 19,
14 2008 in the Northern District of California, which merged the two
15 EEO complaints in one federal action. (Docket No. 1.) The
16 action was transferred to this district on March 13, 2009.
17 (Docket No. 14.) Plaintiff filed an amended complaint on April
18 21, 2009. (Docket No. 22.) Before the court is defendant's
19 motion for summary judgment.⁴

20 Plaintiff alleges in three causes of action for race
21 and national origin discrimination, disability discrimination,
22 and retaliation that the discriminatory conduct he experienced
23 consisted of: (1) being erroneously classified as a foreign
24 national instead of as a lawful U.S. permanent resident on August

25
26 ⁴ Defendant also filed an amended request for judicial
27 notice asking the court to take judicial notice of pleadings and
28 other documents present in the case file. (Docket No. 66.)
Because such documents are matters of public record not
reasonably subject to dispute, the court will take judicial
notice of the documents.

1 22, 2006; (2) being identified as a non-U.S. citizen by his
2 access card that displayed a red stripe instead of a white stripe
3 on October 10, 2006; (3) having his Outlook e-mail identifier
4 changed to include the information that he is a non-citizen on
5 August 23, 2006; (4) having his citation authority removed; (5)
6 being threatened to be removed from the SCEP program; (6) having
7 his performance rating downgraded on May 17, 2007; (7) being
8 charged as AWOL for coming in to work late on August 6, 2007; (8)
9 being placed on administrative leave of August 6, 2007; (9) being
10 terminated on August 27, 2007; (10) defendant's failure to
11 provide reasonable accommodations for his disability; and (11)
12 defendant's failure to put an end to the harassment plaintiff
13 experienced at work. (See FAC.)

14 II. Discussion

15 Summary judgment is proper "if the pleadings, the
16 discovery and disclosure materials on file, and any affidavits
17 show that there is no genuine issue as to any material fact and
18 that the movant is entitled to judgment as a matter of law."
19 Fed. R. Civ. P. 56(c). A material fact is one that could affect
20 the outcome of the suit, and a genuine issue is one that could
21 permit a reasonable jury to enter a verdict in the nonmoving
22 party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
23 248 (1986). The moving party bears the burden of demonstrating
24 the absence of a genuine issue of material fact. Id. at 256. On
25 issues for which the ultimate burden of persuasion at trial lies
26 with the nonmoving party, the moving party bears the initial
27 burden of establishing the absence of a genuine issue of material
28 fact and can satisfy this burden by presenting evidence that

1 negates an essential element of the nonmoving party's case or by
2 demonstrating that the nonmoving party cannot produce evidence to
3 support an essential element of its claim or defense. Nissan
4 Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099,
5 1102 (9th Cir. 2000).

6 Once the moving party carries its initial burden, the
7 nonmoving party "may not rely merely on allegations or denials in
8 its own pleading," but must go beyond the pleadings and, "by
9 affidavits or as otherwise provided in [Rule 56,] set out
10 specific facts showing a genuine issue for trial." Fed. R. Civ.
11 P. 56(e); accord Celotex Corp. v. Catrett, 477 U.S. 317, 324
12 (1986); Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir.
13 1989). On those issues for which it will bear the ultimate
14 burden of persuasion at trial, the nonmoving party "must produce
15 evidence to support its claim or defense." Nissan Fire, 210 F.3d
16 at 1103.

17 In its inquiry, the court must view any inferences
18 drawn from the underlying facts in the light most favorable to
19 the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith
20 Radio Corp., 475 U.S. 574, 587 (1986). The court also may not
21 engage in credibility determinations or weigh the evidence, for
22 these are jury functions. Anderson, 477 U.S. at 255.

23 Claims of race and national-origin discrimination under
24 Title VII are evaluated pursuant to the burden-shifting framework
25 provided in McDonnell Douglas Corp. v. Green, 411 U.S. 792
26 (1973). Under the McDonnell Douglas framework, "the burden of
27 production first falls on the plaintiff to make out a prima facie
28 case of discrimination." Coghlan v. Am. Seafoods Co. LLC, 413

1 F.3d 1090, 1094 (9th Cir. 2005). He may do so by showing that
2 (1) he belongs to a protected class; (2) he performed his job
3 satisfactorily prior to the disparate treatment; (3) he was
4 subjected to an adverse employment action; and (4) similarly
5 situated employees outside the protected class received more
6 favorable treatment. Id.; see Raad Fairbanks N. Star Borough
7 Sch. Dist., 323 F.3d 1185, 1196 (9th Cir. 2003). If plaintiff
8 fails to carry his initial burden to establish a prima facie case
9 of discrimination, summary judgment is appropriate. If plaintiff
10 successfully establishes his prima facie case, the "burden of
11 production, but not persuasion, [] shifts to the employer to
12 articulate some legitimate, nondiscriminatory reason for the
13 challenged action." Chuang v. Univ. of Cal. Davis, 225 F.3d
14 1115, 1123-24 (9th Cir. 2000) (citing McDonnell Douglas, 411 U.S.
15 at 802).

16 Assuming the employer articulates a legitimate,
17 nondiscriminatory reason for its actions, plaintiff, in order to
18 survive summary judgment, bears the burden of supplying evidence
19 to the court that gives rise to an inference of intentional
20 discrimination. See Coghlan, 413 F.3d at 1094 (citing St. Mary's
21 Honot Ctr. at 507-08.). At this stage of the analysis, "[t]he
22 mere existence of a prima facie case, based on the minimum
23 evidence necessary to raise a McDonnell Douglas presumption, does
24 not preclude summary judgment" in favor the employer. See Wallis
25 v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994). Rather,
26 "[i]n response to the defendant's offer of nondiscriminatory
27 reasons, the plaintiff must produce specific, substantial
28 evidence of pretext." Id. "In other words, the plaintiff must

1 tender a genuine issue of material fact as to pretext in order to
2 avoid summary judgment." Id.

3 A. Evidentiary Objections

4 "A trial court can only consider admissible evidence in
5 ruling on a motion for summary judgment." Orr v. Bank of Am., NT
6 & SA, 285 F.3d 764, 773 (9th Cir. 2002) (citing Fed. R. Civ. P.
7 56(e); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181
8 (9th Cir. 1988)). After receiving defendant's Reply and
9 plaintiff's Opposition to defendant's motion to dismiss, the
10 court determined that there were many evidentiary objections to
11 the evidence supplied by both parties and granted the parties an
12 extension of time to resubmit their briefs an evidence to take
13 into account the evidentiary objections.

14 Despite the court's April 23, 2010 Order (Docket No.
15 62) admonishing the parties that statements of undisputed fact
16 are not evidence subject to the Federal Rules of Evidence,
17 plaintiff filed an amended list of objections to several of
18 defendant's stated undisputed facts rather than to the evidence
19 in support of those statements. (Docket No. 71.) To the extent
20 that plaintiff's objections are to the stated undisputed facts
21 themselves as conclusions drawn from the exhibits proffered by
22 defendant, they are inappropriate and are overruled. Plaintiff's
23 amended list of objections also include several blanket
24 objections to multiple sources of evidence listed in support of a
25 statement of undisputed fact. This also contravenes the court's
26 April 23, 2010 Order, which required the parties to separately
27 list each evidentiary objection, "specifically identifying the
28 statement objected to in the evidence and its location, citing

1 the applicable Federal Rule of Evidence, and articulating the
2 objection made therein." (Docket No. 62.) It is impossible for
3 the court to understand, let alone rule upon, broad blanket
4 objections. To the extent that plaintiff broadly objects to the
5 various evidence cited in support of the statements of undisputed
6 fact objected to, those objections are also overruled as
7 inappropriate.

8 The remainder of plaintiff's unorganized and confusing
9 objections are on the basis of relevance, hearsay, lack of
10 foundation, lack of personal knowledge, prejudice, improper
11 character evidence, and assuming facts not in evidence. The
12 court has reminded the parties that on summary judgment, the
13 evidence need not be in a form that is admissible at trial. See
14 Burch v. Regents of the Univ. of Cal., 433 F. Supp. 2d 1110, 1119
15 (E.D. Cal. 2006) (citing Celotex Corp. v. Catrett, 477 U.S. 317,
16 324 (1986)). Furthermore, many of these objections are
17 unnecessary when made to evidence presented in support of a
18 motion for summary judgment, as the court is not in danger of
19 prejudice and the summary judgment standard dictates that summary
20 judgment can be granted "only when there is no genuine dispute of
21 material fact. See Burch, 433 F. Supp. 3d at 1119-20.

22 Plaintiff's objections are therefore overruled.

23 B. Arias's Declaration

24 "The general rule in the Ninth Circuit is that a party
25 cannot create an issue of fact by an affidavit contradicting his
26 prior deposition testimony." Kennedy v. Allied Mut. Ins. Co.,
27 952 F.2d 262, 266 (9th Cir. 1991). This is because "if a party
28 who has been examined at length on deposition could raise an

1 issue of fact simply by submitting an affidavit contradicting his
2 own prior testimony, this would greatly diminish the utility of
3 summary judgment as a procedure for screening out sham issues of
4 fact." Id. at 266 (quoting Foster v. Arcata Assocs., Inc., 772
5 F.2d 1453, 1462 (9th Cir. 1985)).

6 The "sham affidavit rule" may be invoked only if a
7 district court makes "a factual determination that the
8 contradiction was actually a sham" and "the inconsistency between
9 a party's deposition testimony and subsequent affidavit . . .
10 [is] clear and unambiguous." Van Asdale v. Int'l Game Tech., 577
11 F.3d 989, 998-99 (9th Cir. 2009) (internal quotations marks,
12 citations omitted). Accordingly, "the non-moving party is not
13 precluded from elaborating upon, explaining or clarifying prior
14 testimony elicited by opposing counsel on deposition [and] minor
15 inconsistencies that result from an honest discrepancy, a
16 mistake, or newly discovered evidence afford no basis for
17 excluding an opposition affidavit." Messick v. Horizon Indus.,
18 62 F.3d 1227, 1231 (9th Cir. 1995). Plaintiff submitted a
19 declaration in opposition to defendant's motion for summary
20 judgment (Docket No. 70) that defendant contends portions of
21 which ought to be stricken as a sham declaration.

22 Specifically, defendant contends that plaintiff's
23 representations that he was a "Park Ranger" contradict his prior
24 statements that he was a "student park ranger," and his
25 representations that he was a "permanent citizen" and
26 "mischaracterized as a non-US citizen" contradict his earlier
27 admissions that he was not--and still is not--a United States
28 citizen while he was employed by the Army. The evidence is

1 uncontraverted and plaintiff has repeatedly stated that he was
2 always a student employee at Pine Flat Lake. Any representations
3 that plaintiff was a permanent "Park Ranger" will therefore be
4 ignored by the court in deciding defendant's motion to dismiss.
5 Likewise, the evidence is uncontraverted and plaintiff has
6 repeatedly stated that he was not and is not a United States
7 citizen. The court will therefore ignore any reference to the
8 fact that plaintiff was a United States citizen in evaluating
9 defendant's motion to dismiss.

10 Defendant also objects to statements in plaintiff's
11 declaration that he "never demonstrated a poor work attitude" and
12 that he remained positive about his job. The court finds these
13 statements to be merely plaintiff's opinion as to his prior work
14 performance and a minor discrepancy with the prior testimony to
15 which the government compares it. Plaintiff has repeatedly
16 called attention to his positive reviews and lack of
17 confrontations with LaFrentz or other employees before the
18 incidents that form the basis of this lawsuit. These statements,
19 therefore, will be considered as evidence in deciding defendant's
20 motion to dismiss.

21 C. Claims Properly Before the Court

22 In order to maintain a suit alleging employment
23 discrimination against an agency of the United States, a claimant
24 must exhaust his administrative remedies in accordance with
25 published procedures. See Leorna v. United States Dep't of
26 State, 105 F.3d 548, 550 (9th Cir. 1997) (citing Brown v. General
27 Serv. Admin., 425 U.S. 820, 832 (1976)); 42 U.S.C. § 2000e-16.
28 Federal regulations require that a federal employee raise a

1 discrimination claim with an Equal Employment Opportunity ("EEO")
2 counselor within forty-five days of an adverse employment action.
3 See Leorna, 105 F.3d at 550 (citing 29 C.F.R. § 1614.105(a)).
4 This forty-five day limit acts as a "statute of limitations for
5 filing suit." Johnson v. U.S. Treas. Dep't., 27 F.3d 415, 416
6 (9th Cir. 1994). The EEO may dismiss a complaint or portions
7 thereof for, inter alia, failure to comply with the forty-five
8 day limit, and failure to state a claim. 29 C.F.R. § 1614.107.
9 A partial dismissal of a complaint is reviewable by an EEOC
10 administrative judge on request for a hearing on the entire
11 complaint before the agency issues a final decision, or appealed
12 to the EEOC Office of Federal Operations ("OFO") within thirty
13 days of a final decision on the remaining claims in the
14 complaint. (See, e.g., Amended Taylor Decl. Ex. 33.) Any
15 decisions not challenged are waived. (Id.)

16 Federal courts lack subject matter jurisdiction over
17 employment discrimination claims that have not been presented and
18 exhausted in the administrative process. 42 U.S.C. § 2000e-16.
19 Plaintiffs bear the burden of showing they have exhausted their
20 administrative remedies and that the federal courts have
21 jurisdiction over their claims. See McNutt v. Gen. Motors
22 Acceptance Corp. of Ind., 298 U.S. 178 (1936).

23 Plaintiff's suit is founded on eleven alleged acts of
24 discrimination, all of which were raised in either plaintiff's
25 first or second complaint to the Army EEO office. Eight of the
26 acts of discrimination at issue in this case were accepted for
27 review by the Army EEO office and three were rejected. The fact
28 that the Army EEO office rejected three of the alleged acts of

1 discrimination that plaintiff raises in this suit is not enough
2 to preclude this court's jurisdiction over claims that stem from
3 those acts. All of the claimed incidents of discrimination in
4 plaintiff's Complaint are therefore properly before the court.

5 D. First Cause of Action for Race and National Origin
6 Discrimination

7 1. Actions Alleged in First EEO Complaint

8 It is not disputed that plaintiff belongs to a
9 protected class and that prior to the implementation of the new
10 security measures that plaintiff performed his job
11 satisfactorily. Defendant does not argue that the security
12 measures do not constitute an adverse employment action.
13 Primarily at issue is whether similarly situated employees
14 outside of plaintiff's protected class received more favorable
15 treatment than plaintiff. The evidence in the record indicates
16 that Manning e-mailed all front-line managers in the Sacramento
17 District asking them about non-citizen employees once he became
18 aware of non-citizen contractors of various nationalities in the
19 Sacramento District that had access to sensitive information.
20 LaFrentz apparently responded to Manning's e-mail indicating that
21 there were two non-U.S. citizen student employees at Pine Flat
22 Lake, and Manning made the two student employees at Pine Flat
23 Lake as well as two other non-U.S. citizen employees brought to
24 his attention comply with updated security measures.

25 The evidence plaintiff points to in support of the
26 contention that the changes were the result of unlawful
27 discrimination is that Manning's e-mails that LaFrentz forwarded
28 to plaintiff indicated that plaintiff and Galvan's e-mail

1 notifiers and access cards would have to indicate their "Mexican
2 citizenship" and referred to them as "Mexican citizens."⁵
3 (Amended Taylor Decl. Ex. 8-10.) Plaintiff and Galvan were both
4 Mexican citizens at the time and were the only non-citizen
5 employees at Pine Flat Lake affected by Manning's security
6 policies. While there is evidence that the security policies
7 were applied to other non-U.S. citizen employees in the
8 Sacramento district, (See (Amended Taylor Decl. Ex. 33, at 4),
9 there remains a material dispute as to whether other non-U.S.
10 citizen employees were directed to have their country of
11 citizenship revealed in the same way that Manning directed that
12 plaintiff's Mexican citizenship be revealed. Plaintiff has
13 therefore met his prima facie burden.

14 Defendant has, in turn, articulated a legitimate,
15 nondiscriminatory reason for implementing the challenged security
16 measures. Namely, the heightened security concerns that arise
17 when non-citizen employees of the Department of Defense have
18 access to sensitive information and computer systems and the
19 related need to identify non-citizen employees. Plaintiff has,
20 however, provided evidence of pretext sufficient to meet his
21 burden under McDonnell Douglas. Plaintiff's supervisors knew
22 that he was not a U.S. citizen when he was hired and originally
23 issued his access card, Outlook identifier, and citation
24 authority. Yet it was not until long after plaintiff began
25 working at Pine Flat Lake that he was required to comply with the
26 regulations. That Manning stated in his e-mails that plaintiff

27
28 ⁵ In his brief, plaintiff argues that Manning's e-mails refer to plaintiff's "Mexican status." The court has been unable to locate any such reference.

1 had to reveal his "Mexican" citizenship rather than simply his
2 status as a non-U.S. citizen is also evidence sufficient to
3 withstand summary judgment that Manning's justification for the
4 security measures could be pretext.

5 2. Actions Alleged in Second EEO Complaint

6 With respect to plaintiff's alleged race and national
7 origin discrimination claims that stem from his second EEO
8 complaint for being listed as AWOL on August 6, 2006, being
9 placed on administrative leave on August 6, 2007, and being
10 terminated from his position on August 27, 2007, plaintiff has
11 also met his prima facie burden. Again, it is not disputed that
12 plaintiff is a member of a protected class and that the
13 challenged actions are adverse employment actions. Plaintiff has
14 also provided evidence in the form of performance reviews and
15 awards that he performed his job in an overall satisfactory
16 manner prior to and after the events at issue occurred sufficient
17 to withstand summary judgment. At issue is whether others
18 outside of plaintiff's protected class were treated more
19 favorably than plaintiff.

20 Individuals are similarly situated when they have
21 similar jobs and display similar conduct. See, e.g., Vasquez v.
22 City of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003); see also
23 Wall v. Nat'l R.R. Passenger Corp., 718 F.2d 906, 909 (9th Cir.
24 1983) (employees not similarly situated where other employees do
25 not have disciplinary record). The employees need not be
26 identical; they must simply be similar "in all material
27 respects." Moran v. Selig, 447 F.3d 748, 755 (9th Cir. 2006).
28 The evidence in the record suggests that the operational

1 distinction between a student park ranger and permanent park
2 ranger was minimal. (Compare Amended Taylor Decl. Ex. 3 with id.
3 Ex. 5). For purposes of establishing his prima facie burden, the
4 court will consider permanent park rangers to be similarly
5 situated in all material respects to student park rangers.
6 Plaintiff generally compares himself to Park Rangers Anderson,
7 Hershey, Thompson, Ehrke, and Coons. (Amended Taylor Decl. Ex.
8 38 (Pl's Resp. to Interrogatories Set One) ¶¶ 1-2.)

9 With respect to plaintiff's being marked AWOL on August
10 6, 2006, the evidence indicates that other employees were not
11 present at their booths or positions but were not punished in a
12 manner similar to plaintiff. This is sufficient to satisfy
13 plaintiff's prima facie burden. Defendant satisfies its burden
14 by arguing that its legitimate, non-discriminatory reason to mark
15 plaintiff AWOL was that plaintiff failed to work the entirety of
16 his shift as required by attendance policies. However, evidence
17 that other employees were not marked AWOL as plaintiff was that
18 day raises a material dispute of fact with respect to whether the
19 stated reason for marking plaintiff as AWOL was mere pretext for
20 a discriminatory motive.

21 With respect to plaintiff being put on administrative
22 leave and eventually being terminated from his position as a
23 student park ranger, plaintiff compares himself specifically to
24 Park Rangers Coons and Thompson. Park Ranger Coons was
25 terminated by LaFrentz for, inter alia, disobeying orders, lack
26 of professionalism, and bad judgment. (Amended Taylor Decl. Ex.
27 18.) Plaintiff argues that he should not have been placed on
28 administrative leave or terminated because Coons was not

1 terminated until after multiple incidents of bad behavior whereas
2 plaintiff alleges he was terminated only after one incident.
3 Plaintiff also compares himself to Park Ranger Thompson, who in
4 2005 was late to park ranger training in Jackson, California
5 because he overslept from being intoxicated the night before.
6 (Thompson Dep. (Docket No. 58) 24-25.) La Frentz was Thompson's
7 team leader at the time, and LaFrentz told Thompson he would have
8 to report Thompson's absence to plaintiff's supervisor when they
9 returned from the retreat. (Id. at 25.) Thompson's supervisor
10 decided not to formally punish Thompson for being late to the
11 training. (Id.) Plaintiff, however, was counseled and punished
12 for arriving to work late on August 6, 2007, the end result of
13 which was his termination. These comparisons are sufficient to
14 satisfy plaintiff's prima facie burden that he was treated
15 differently than other park rangers at Pine Flat Lake.

16 Defendant has articulated a legitimate, non-
17 discriminatory reason for marking plaintiff AWOL, placing him on
18 administrative leave, and eventually terminating him.
19 Specifically, defendant argues that plaintiff violated workplace
20 attendance policies and was insubordinate to management. The
21 evidence is undisputed that plaintiff had been counseled about
22 attendance policies before the August 6, 2007 incident and that
23 he had previously been marked AWOL. On August 6, 2007, plaintiff
24 arrived to work one hour late. Furthermore, plaintiff admits
25 that he called LaFrentz a "jerk," that he told him to "hurry up"
26 off the telephone, that he refused to talk on the phone to Foster
27 when asked, and that he left work without having his leave slip
28 signed. Plaintiff's comparison to Park Rangers Coons and

1 Thompson, however, raises a material fact as to whether plaintiff
2 was disciplined and eventually terminated because of a
3 discriminatory motive and is sufficient to withstand a motion for
4 summary judgement.

5 E. Second Cause of Action for Retaliation

6 Under Title VII, an employer may not take any adverse
7 employment action against an employee who has opposed any
8 practice made unlawful by Title VII or made a charge, testified,
9 assisted, or participated in any manner in any investigation,
10 proceeding or hearing under Title VII. 42 U.S.C. § 2000e-3(a).

11 The McDonnell Douglas burden-shifting framework applies to
12 retaliation claims under FEHA and Title VII. Stegall v. Citadel
13 Broadcasting Co., 350 F.3d 1061, 1065-66 (9th Cir. 2003); Flait
14 v. N. Am. Watch Corp., 3 Cal. App. 4th 467, 475-76 (1992). The
15 employee must establish a prima facie case by showing that the
16 employee engaged in a protected activity, his employer subjected
17 him to adverse employment action, and there is a causal link
18 between the protected activity and the employer's action.

19 Stegall, 350 F.3d at 1065-66; Akers v. County of San Diego, 95
20 Cal. App. 4th 1441, 1453 (2002). Then the employer has the
21 burden to articulate a legitimate, non-retaliatory reason for the
22 action taken. The employee then bears the ultimate burden of
23 demonstrating that any such reason was merely a pretext for a
24 discriminatory motive, and that the retaliation was intentional.
25 Stegall, 350 F.3d at 1066; Akers, 95 Cal. App. 4th at 1453.

26 The first two prongs necessary to establish a prima
27 facie burden of retaliation do not appear to be in dispute.
28 Plaintiff was charged AWOL, put on administrative leave, and

1 ultimately terminated. Plaintiff made contact with the Equal
2 Employment Opportunity Commission on September 27, 2006, and
3 filed his first discrimination complaint on November 2, 2006.
4 LaFrentz was interviewed by an EEO counselor on November 27,
5 2006, and plaintiff's EEO claim was denied on June 26, 2008.
6 Plaintiff was placed on administrative leave on August 6, 2007
7 and was terminated from his position on August 27, 2007. Other
8 than the fact that defendant was aware of plaintiff's protected
9 activity, plaintiff does not provide any direct evidence in
10 support of his allegations that the administrative actions taken
11 against him were done to retaliate for filing an EEO complaint.

12 The timing of alleged retaliatory conduct, however, can
13 provide circumstantial evidence of retaliation that is sufficient
14 to create a prima facie case of retaliation. See Passantino v.
15 Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 507 (9th
16 Cir. 2000) (noting that causation can be inferred from timing
17 alone); see also Miller v. Fairchild Indus., 885 F.2d 498, 505
18 (9th Cir. 1989) (stating that a prima facie case of causation was
19 established when discharges occurred forty-two and fifty-nine
20 days after EEOC hearings); Yartzoff v. Thomas, 809 F.2d 1371,
21 1376 (9th Cir. 1987) (stating that sufficient evidence existed
22 where adverse actions occurred less than three months after
23 complaint filed, two weeks after charge first investigated, and
24 less than two months after investigation ended). But see
25 McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1124-25 (9th Cir.
26 2004) (holding temporal link alone did not establish prima facie
27 case of retaliation where the "events were separated by a year
28 and a half").

1 Plaintiff was placed on administrative leave more than
2 eight months after plaintiff filed his EEO complaint and LaFrentz
3 was interviewed by an EEO counselor. However, the evidence in
4 the record shows that the Army EEO investigation was still
5 pending at the time of plaintiff's termination--indeed, the
6 investigation was not completed until ten months after plaintiff
7 had been terminated from his position at Pine Flat Lake. While
8 in some circumstances the gap in time between the filing of an
9 EEO complaint and the adverse employment action can be too great
10 to support an inference of causation based on timing alone, see,
11 e.g., Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1035
12 (9th Cir. 2006) (nine month gap between complaint of
13 discrimination and adverse employment action too great to support
14 inference of causation), in this case plaintiff has met his prima
15 facie burden. Unlike in Cornwell, the evidence in this case is
16 undisputed that plaintiff's supervisor in fact was aware of
17 plaintiff's EEO complaint and participated in the ongoing
18 investigation of plaintiff's claims of discrimination.

19 The court has already explained that defendant has
20 articulated a legitimate, non-discriminatory reason for placing
21 plaintiff on administrative leave and subsequently terminating
22 him. Plaintiff's comparison to Park Rangers Thompson and Coons
23 nevertheless raises a material dispute as to whether the
24 disciplinary actions taken against him were the result of
25 plaintiff's protected EEO activity, and the court will therefore
26 deny defendant's motion for summary judgement.

27 F. Third Cause of Action for Disability Discrimination
28 Under the Americans With Disabilities Act

1 The federal government may not be sued under the
2 Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-83,
3 because it is specifically excluded from the ADA's definition of
4 "employer." See 42 U.S.C. §§ 1211(2), 12111(5)(B); Zimmerman v.
5 Oregon Dept. of Justice, 170 F.3d 1169, 1172 (9th Cir. 1999).
6 Rather, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq.,
7 provides the exclusive judicial remedy for claims based on a
8 federal employee's disability. See, e.g. McGuinness v. United
9 States Postal Serv., 744 F.2d 1318, 1322-1323 (7th Cir. 1984);
10 Boyd v. U.S. Postal Serv., 752 F.2d 410, 413-414 (9th Cir. 1985).
11 While plaintiff's third cause of action for disability
12 discrimination is brought under the ADA, the court will interpret
13 it as one brought under the Rehabilitation Act.

14 "To establish a prima facie case of disability
15 discrimination, a plaintiff must show (1) he is disabled within
16 the meaning of the statute; (2) he is otherwise qualified for the
17 position; (3) he was adversely treated because of his disability;
18 and (4) he worked for the federal government." Wilborn v.
19 Ashcroft, 222 F. Supp. 2d 1192, 1207 (S.D. Cal. 2002) (citing
20 Reynolds v. Brock, 815 F.2d 571, 573-74 (9th Cir. 1987)). If a
21 plaintiff can establish a prima facie case of disability
22 discrimination, "the burden shifts to the defendant to articulate
23 a legitimate, non-discriminatory reason for the employment
24 decision. The burden then shifts back to the plaintiff to
25 produce evidence sufficient to allow a reasonable factfinder to
26 conclude that defendant's articulated reason is pretextual." Id.
27 "In other words, [] plaintiff 'must tender a genuine issue of
28 material fact as to pretext in order to avoid summary judgment.'"

1 Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1983)
2 (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir.
3 1983)).

4 The Americans with Disabilities Act, whose standards of
5 substantive liability are incorporated in the Rehabilitation Act,
6 defines "disability" as: (A) a physical or mental impairment that
7 substantially limits one or more of the major life activities of
8 such individual, (B) a record of such an impairment, or (C) being
9 regarded as having such an impairment. 42 U.S.C. § 12102(1).

10 Plaintiff's third cause of action alleges that he is disabled due
11 to severe mental anxiety and emotional stress. (FAC ¶ 45.) The
12 regulations define a physical or mental impairment as:

13 (1) Any physiological disorder, or condition, cosmetic
14 disfigurement, or anatomical loss affecting one or more
15 of the following body systems: neurological,
16 musculoskeletal, special sense organs, respiratory
(including speech organs), cardiovascular, reproductive,
digestive, genito-urinary, hemic and lymphatic, skin, and
endocrine; or

17 (2) Any mental or psychological disorder, such as mental
18 retardation, organic brain syndrome, emotional or mental
illness, and specific learning disabilities.

19 29 C.F.R. § 1630.2(h). The regulations further provide that the
20 term "substantially limits" means:

21 (i) Unable to perform a major life activity that the
22 average person in the general population can perform; or

23 (ii) Significantly restricted as to the condition, manner
24 or duration under which an individual can perform a
25 particular major life activity as compared to the
condition, manner, or duration under which the average
person in the general population can perform that same
major life activity.

26 Id. § 1630.2(j)(1). The ADA defines "major life activities" as
27 including: "caring for oneself, performing manual tasks, seeing,
28 hearing, eating, sleeping, walking, standing, lifting, bending,

1 speaking, breathing, learning, reading, concentrating, thinking,
2 communicating, and working," as well as including major bodily
3 functions. 42 U.S.C. § 12102(2)(A)-(B). The regulations further
4 inform that:

5 (3) With respect to the major life activity of working-

6 (i) The term substantially limits means
7 significantly restricted in the ability to
8 perform either a class of jobs or a broad
9 range of jobs in various classes as compared
10 to the average person having comparable
training, skills and abilities. The inability
to perform a single, particular job does not
constitute a substantial limitation in the
major life activity of working.

11 29 C.F.R. § 1630.2(j)(3). Finally, the regulations provide
12 guidance for determining whether all three elements of
13 "disability"--physical or mental impairment, substantially
14 limiting, major life activity--are met:

15 (2) The following factors should be considered in
16 determining whether an individual is substantially
limited in a major life activity:

17 (i) The nature and severity of the impairment;
18 (ii) The duration or expected duration of the
impairment; and
19 (iii) The permanent or long term impact, or the
20 expected permanent or long term impact of or
resulting from the impairment.

21 Id. § 1630.2(j)(2).

22 The evidence in the record indicates that plaintiff
23 sometimes experienced stress at work that caused him to lose the
24 ability to concentrate, request sick leave, and leave his
25 scheduled shifts early. This is sufficient to survive summary
26 judgment as to whether plaintiff is "disabled" under the statute.
27 Likewise, there is sufficient evidence that plaintiff was
28 otherwise qualified for his position, as he performed his job for

1 years in an exemplary manner and continued to perform
2 satisfactorily even after he began experiencing stress on the
3 job. Similarly, plaintiff has presented evidence sufficient to
4 meet his prima facie burden that he was adversely treated because
5 of his workplace stress. On August 6, 2007, plaintiff left work
6 after a heated exchange with LaFrentz during which he presented a
7 leave slip seeking time off for stress. There is evidence that
8 plaintiff sought to remove himself from LaFrentz's presence, and
9 that as a result of his stress he called LaFrentz a "jerk" and
10 would not talk to Foster on the phone when asked. The
11 disciplinary actions taken against plaintiff are also evidence
12 that defendant failed to make reasonable accommodations for
13 plaintiff's stress disability.

14 The same evidence explained earlier satisfies
15 defendant's burden to provide a non-discriminatory reason for the
16 disciplinary actions taken against plaintiff. Specifically, that
17 plaintiff was late to work due to sleeping in, that he called
18 LaFrentz a "jerk" and left work without having his leave slip
19 approved. Yet a material issue of fact remains as to whether
20 these actions were taken because of plaintiff's disability. The
21 court will therefore deny defendant's motion for summary judgment
22 with respect to plaintiff's third cause of action.

23 IT IS THEREFORE ORDERED that defendant's motion for
24 summary judgment be, and the same hereby is, DENIED.

25 DATED: June 17, 2010

26 

27 WILLIAM B. SHUBB
28 UNITED STATES DISTRICT JUDGE